BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SCOTT THARP	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,952
K. C. GUNITE	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from a June 7, 1996, preliminary hearing Order by Administrative Law Judge Alvin E. Witwer.

Issues

The Administrative Law Judge ordered respondent and its insurance carrier to provide additional medical treatment under the direction of John A. Pazell, M.D., for claimant's low back complaints. As this was a post award proceeding, the Administrative Law Judge also granted counsel for claimant a $500 attorney fee to be paid by the respondent and its insurance carrier.

In their request for Appeals Board review, respondent and its insurance carrier raise the following issues:

(1) Whether the Administrative Law Judge exceeded his authority in granting benefits.

(2) Whether claimant suffered an aggravation of his injury such that his current need for medical treatment would be the responsibility of his subsequent employer.

(3) Whether claimant should be denied treatment at the expense of respondent and its insurance carrier.

(4) Whether claimant's request for attorney fees should be denied.

Claimant counters that the preliminary hearing Order is not subject to review by the Workers Compensation Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the transcript of the January 27, 1995 settlement hearing and the transcript of the June 7, 1996 preliminary hearing, together with the exhibits attached thereto and the briefs of the parties, the Appeals Board finds, for preliminary hearing purposes:

For the reasons stated below, the Order of the Administrative Law Judge is affirmed.

(1)(2)(3) The Order by the Administrative Law Judge followed a post-award preliminary hearing on claimant's request for additional medical treatment. This docketed claim stems from a July 2, 1993 low-back injury claimant suffered while working for respondent. Claimant's past medical treatment included lumbar laminectomy/discectomy surgery at L5-S1 on October 1, 1993 performed by Dr. David Tillema. Claimant and respondent entered into a settlement on January 27, 1995 whereby claimant received an award based upon a 16.5 percent permanent partial disability to the body as a whole. The issue of future medical treatment was left open. Respondent admits that claimant preserved his right to seek future medical benefits. However, respondent contends that claimant's present complaints and symptoms are not the direct and natural consequence of his original injury. Rather, according to respondent, they are the result of an aggravation to the preexisting condition which should be considered a new accident.

Claimant did not return to work with respondent after he was released by Dr. Tillema. Since then claimant has worked for several different employers performing essentially the same job he had performed with respondent. His duties include spraying Gunite on the sides of pools, tying rebar, grading and leveling surfaces, setting 2x4 forms and demolishing existing structures, all in connection with the construction of pools. This involves physically demanding work including heavy lifting and carrying of objects, repetitive pushing, pulling, bending, twisting and turning at the waist.

At the time of the settlement, claimant described ongoing problems with his low back including pain radiating into his hips and legs. In his June 7, 1996 preliminary hearing testimony, claimant described similar problems. Respondent contends that in order for claimant to be entitled to additional medical benefits, he must show that his present complaints are greater than those complaints and problems claimant had when he settled his claim. The Appeals Board does not agree. However, it is the claimant's burden to show that any increase in his symptoms or complaints for which he now seeks additional medical treatment are the natural and direct consequence of his original injury rather than the result of a new injury or aggravation. Respondent points to the physically demanding nature of claimant's subsequent employment and argues that claimant's condition must have been aggravated by those activities such that a new injury must be found to have occurred. Only the claimant testified in this matter. Claimant contends that his symptoms are in the same area of his body but are worse now than they were at the time of settlement. According to claimant, his condition in his low back and legs has progressively

worsened since his surgery. Nevertheless, he denies aggravation by subsequent accident or injury. Claimant specifically testified that he has not done anything in his subsequent employment to aggravate or reinjure his back.

Claimant was examined on June 13, 1994, and again on January 11, 1996 by orthopedic surgeon John A. Pazell, M.D. The record contains a January 18, 1996 report by Dr. Pazell which includes the following opinion:

> "It is my professional opinion, with all medical probability and certainty, that Mr. Tharp needs additional treatment. His problems in his low back are a continuation of the problems which I observed in my examination in June of 1994. This is not a new problem. This is a continuation of his previous problem."

We will now address the specific issues raised by the parties, beginning with the Claimant's Motion to Dismiss Respondent's Request for Appeals Board Review.

Post-award hearings before an administrative law judge which were held pursuant to a Form E-3 Application for Preliminary Hearing on issues relating to medical treatment and/or temporary total disability benefits are treated as preliminary hearing orders for purposes of Appeals Board jurisdiction. Therefore, before the Appeals Board can take jurisdiction of the appeal, there must exist a disputed issue concerning whether:

(1) The employee suffered an accidental injury;

(2) The injury arose out of and in the course of the employee's employment;

(3) Notice was given or claim timely made; or

(4) Certain legal defenses apply.

See K.S.A. 44-534a, as amended. Furthermore, K.S.A. 44-551(b)(2)(A), as amended, provides that the Appeals Board cannot take jurisdiction over a preliminary order unless it is alleged that the administrative law judge somehow exceeded his jurisdiction in granting or denying benefits. Under K.S.A. 44-534a(a)(2), as amended, the four above-listed issues are considered jurisdictional. The June 7, 1996 Order by Judge Witwer states that it pertains to and arises from a preliminary hearing. Accordingly, the issue concerning claimant's entitlement to post-award medical treatment was decided pursuant to the summary hearing procedure provided for under K.S.A. 44-534a, as amended. This appeal arises, therefore, under the limited jurisdiction afforded the Appeals Board for an appeal from a preliminary hearing. Issues concerning the furnishing of medical treatment are not jurisdictional. Accordingly, to the extent respondent's issues 1 and 3 in respondent's Request for Board Review deal with claimant's present need for medical treatment, they are not reviewable at this stage of the proceeding. However, to the extent respondent's issues 1, 2 and 3 allege a subsequent, intervening injury, such that they give rise to a disputed issue of whether claimant's present condition and need for medical treatment results from the injury arising out of and in the course of his employment with respondent, the Appeals Board has jurisdiction to review that issue.

Respondent presented no evidence beyond claimant's own testimony in support of its allegation of a subsequent, intervening accident. From the record as it presently exists, the Appeals Board finds that claimant's testimony coupled with the medical opinion of Dr. Pazell, satisfies claimant's burden of proving that his present need for medical treatment is a direct and natural result of his original work-related injury. The order for medical benefits is, therefore, affirmed.

(4) Judge Witwer, in paragraph 3 of his June 7, 1996 Order, states:

> "Inasmuch as this is a post-Award proceeding, counsel for the claimant is granted an attorney fee of $500 to be paid him by the respondent - insurance carrier for services rendered in conjunction with the post-Award matter."

Respondent and its insurance carrier, in their Request for Board Review, list four issues for which they seek review by the Appeals Board. Issue 4 reads as follows: "Whether attorney fees in this case of claimant's counsel should be denied." However, respondent's brief is silent on the issue of attorney fees. No argument or authority is given in support of the challenge to Judge Witwer's Order in this regard. Inasmuch as we cannot determine whether respondent has chosen to abandon this issue, we will decide it.

There is no dispute in the record as to the amount of attorney fees awarded. The Appeals Board, therefore, treats this issue as going solely to a question regarding the propriety of any award of attorney fees. K.S.A. 44-536(g) provides in pertinent part:

> "In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, or otherwise, such attorney shall be entitled to reasonable attorney fees for such services . . . ."

The Appeals Board finds the June 7, 1996 proceeding to have been "subsequent to the ultimate disposition of the initial and original claim" and to have been a "hearing for additional medical benefits." Accordingly, claimant's attorney fees at the expense of respondent and its insurance carrier are recoverable. The Order for attorney fees is affirmed.

Claimant's counsel now seeks additional attorney fees for services provided in connection with this appeal. This request should be presented to the Administrative Law Judge for a determination of a reasonable amount for such services.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the June 7, 1996 Order of Administrative Law Judge Alvin E. Witwer should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Overland Park, KS
Stephen A. McManus, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director